WAT 6-1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 8 1989

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Proposed Aquifer Exemption on the Osage Mineral Reserve

FROM: Andrew B. Cherry, Attorney/Advisor
Underground Injection Control Branch

THRU: Donald M. Olson, Chief
Compliance and Enforcement Section

TO: Richard C. Peckham, Geologist
Region VI

Attached is headquarter's review of the draft public notice and Fact Sheet for the Happy Hollow and Z-Sand aquifer exemptions on the Osage Mineral Reserve. Based on Guidance 34 (copy attached) and the fact that the proposed exemptions cover 21 square miles, the proposed action is considered a "substantial" program modification. For this reason, a rulemaking action (proposed and final) is necessary to promulgate the exemptions.

I have attached a draft of a Federal Register notice of the proposed rule for the exemptions. The draft provides a more detailed explanation of what the action is, why it is needed, and how the criteria for exemptions are met. The attachment to Guidance 34 on aquifer exemptions discusses each of the criteria and what must be demonstrated by the owner/operator in order to meet them. This document plus the Fact Sheet and the information submitted by Phillips should be enough to fill in the gaps left in the draft of the proposed rule. The legal locations listed in the Fact Sheet which will be transferred to the table for new section 147.2908(c) need to be altered to fit into the table's format. I have attempted to get it started in my draft.

Thank you for the opportunity to review this action early in the process. Please do not hesitate to contact me if clarification or additional guidance is needed FTS 382-5561.

Attachments

ENVIRONMENTAL PROTECTION AGENCY

DRAFT

40 CFR PART 147

[FRL]

Underground Injection Control Programs; Aquifer Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to designate a portion of the Happy Hollow and Z-Sand aquifers in western Osage County, Oklahoma as exempted aquifers in accordance with 40 Code of Federal Regulations (CFR) 147.2908. The aquifer exemptions would be limited to injection of water of a quality equal to or better than that contained in the proposed exempted aquifers. The proposed exemptions are being sought to allow the operator to maintain fluid levels below the base of the lowermost Underground Source of Drinking Water.

DATE: EPA will accept public comment on the proposed rule until (insert date 45 days from the date of publication in the FEDERAL REGISTER); a public hearing will be held on _____, at _____; requests to present oral testimony must be received on or before_____. EPA reserves the right to forego the hearing if sufficient public interest is not expressed.

FOR FURTHER INFORMATION CONTACT: Richard C. Peckham, Underground Injection Control Permits and Enforcement Section, (6W-SE), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 1200, Dallas Texas, 75202, Telephone: (214) 655-7165.

SUPPLEMENTARY INFORMATION:

I. Introduction and background

The SDWA protects all underground sources of drinking water, whether or not specifically designated as such. The regulations define "underground source of drinking water" (USDW) very broadly as: an aquifer which supplies or has sufficient capacity to supply a public water system; and either currently supplies drinking water for human consumption, or contains less than 10,000 mg/l total dissolved solids (TDS); and is not an exempted aquifer. Under existing regulations, EPA may exempt from the UIC program aquifers which have the capacity to supply public water systems and contain less than 10,000 mg/l TDS if they do not now and could not in the future serve as a source for a public water supply for one of the reasons recognized in the regulations (40 CFR 146.4, 147.2908). Owners and operators of injection wells may inject into an exempted aquifer.

II. Aquifer exemptions

EPA is proposing to designate a portion of the Happy Hollow and Z-Sand aquifers in western Osage County, Oklahoma as exempted aquifers in accordance with 40 CFR 147.2908. The aquifer exemptions would be limited to injection of water of a quality equal to or better than that contained in the proposed exempted aquifers. The proposed exemptions are being sought to allow the operator to maintain fluid levels below the base of the lowermost USDW.

[Insert narrative description of formation(s), production field(s), and the water quality in the aquifers (i.e.,, less than 10,000 TDS so meets the definition of USDW). Also describe what the aquifers are currently being used for and how the conditions of 147.2908 are satisfied. Be more specific than just repeating the 147.2908 text. Page 2 of the Fact Sheet is a good start. We just need to explain how the conditions are satisfied and what our findings are and what we base them on. I would also mention that the owner does not intend to inject into the proposed exempted aquifers. Are maps available? Is there currently injection into the aquifers? Are the exemptions to be for the entire fields affected? Are the exemptions limited to the intended injection formations and to Class II injection? These types of questions should be answered in the Notice. The Attachment 3 to Guidance 34 which I have enclosed is a good guide as to what Phillips needs to demonstrate and how. Again, page 2 of the Fact Sheet is a good start at this and it sounds like Phillips has already done most of its homework. A discussion of the Vamoosa aquifer being excluded and why is needed. The Fact Sheet reference to the Vamoosa (T26N, R6E-Sec. 24) appears to say that the entire section is included in the exemption and not excluded.]

These exemptions will become effective 30 days after publication of the final rule in the Federal Register. Public comment is invited, particularly if information is available to show that any of the formations being exempted are currently

serving as sources of drinking water, or if there is other current injection activity into USDWs where exemptions are not proposed.

III. Regulatory Impact

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether the proposed amendment to the regulations is major and therefore subject to the requirements of a Regulatory Impact Analysis. The proposed amendment does not impose any additional burden on the States or the regulated community. The proposed amendment does not have an annual effect on the economy of $100 million or more, nor does it satisfy any of the other criteria listed in section 1(b) of the Executive Order. Therefore this proposed amendment does not constitute a major rulemaking. This proposal has been submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Paperwork Reduction Act

EPA has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply to this proposed rule since no information collection or recordkeeping would be involved. This proposed rule would merely exempt specific portions of certain aquifers for the purposes of Class II injection in the Osage Mineral Reserve and any information collection or recordkeeping requirements have already been approved by OMB.

C. Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act, 5 U.S.C 601 et seq., an agency is required to prepare an initial regulatory flexibility analysis whenever it is required to publish general notice of any proposed rule, unless the head of the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This proposed amendment to the regulations requires no additional reporting or other burdens on the regulated community. Therefore, the Administrator certifies that this regulation will not have a significant impact on a substantial number of small entities.

Dated:_____

_____

William K. Reilly

Administrator

Therefore, 40 CFR Part 147 is proposed to be amended as follows:

1. The authority citation for Part 147 would continue to read as follows:

AUTHORITY: 42 U.S.C 300h; and 42 U.S.C. 6901 et seq.

2. Section 147.2908 is proposed to be amended by adding a new paragraph (c) to read as follows:

§ 147.2908 Aquifer Exemptions.

* * * * *

(c) In accordance with subsections (a) and (b) of this section, those portions of aquifers described below are hereby exempted for the purpose of Class II injection activity. This exemption applies only to the aquifers tabulated below, and includes those portions of the aquifers defined on the surface by an outer boundary of those quarter-quarter sections dissected by a line drawn parallel to [but one-quarter mile outside] the field boundary. Maps showing the exact boundaries of the fields may be consulted at the EPA's Region 6 Office, and at the EPA Headquarters in Washington, D.C.

Formation	Approximate depth	Location
[_____]Field		
Buck Creek Formation		
Happy Hollow aquifer	500-800	T25N, R6E-NW/4SW/4 Sec.2
Z-Sand aquifer	500-800	T26N, R6E-Section 2.

MEMORANDUM

SUBJECT: Guidance for Review and Approval of State Underground Injection Control (UIC) Programs and Revisions to Approved State Programs. GWPB Guidance #34

FROM: Victor J. Kimm, Director
Office of Drinking Water (WH-550)

TO: Water Division Directors
Regions I - X

PURPOSE

The purpose of this document is to provide guidance to EPA Regional Offices on the revised process for the approval of State primacy applications and the process for approving modifications in delegated programs, including aquifer exemptions.

BACKGROUND

On January 9, 1984, the Deputy Administrator announced an Agency policy for a State program approval process placing the responsibility on Regional Administrators to recommend UIC program approval to the Administrator and making Regional Administrators clearly responsible for assuring that "good, timely decisions are made." At the same time, we are reaching a point in the UIC program where States are beginning to make revisions to approved programs and we are promulgating amendments to the minimum requirements that the States must adopt within 270 days. We have reviewed the existing approval process and this Guidance spells out the adjustments necessary to comply with the Agency's policy. This new process will take effect on July 5, 1984, and applies to approval of primacy applications and "substantial" program revisions, which are both rulemaking and cannot be delegated by the Administrator under the Safe Drinking Water Act. This guidance also addresses review and approval of non-substantial program revisions which are the responsibility of the Regional Administrator.

BRASIER:3/22/84:WP 74a:Brsr Complnc Strgy disk
REVISED:5/14/84:REVISED 7/2/84

CONCURRENCES

SBOL	SPD	OAC						
NAME	Beth							
DATE	7/5/84	7/6/84						

EPA Form 1320-1 (12-70)

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☆ U.S. GPO: 1983 O - 403-201

I REVIEW AND APPROVAL OF APPLICATIONS

REGIONAL ROLE

The effect of the new Agency policy is to give Regions greater responsibility for managing the delegation of EPA programs. The FY 1984 Office of Water Guidance suggests that Regions develop State-by-State delegation strategies, although formal schedules for submittal and approval of State applications are not required after FY 1984. Regions are to work with States to develop approvable applications. They are to solicit and resolve Headquarters comments, "keep the clock" on the formal review period, recommend approval to the Administrator, and are responsible for timely approvals. In this process, the Regions speak for the Agency on approval matters but are advised not to make commitments regarding unresolved major issues raised by Headquarters Offices.

Draft applications

The Regions are responsible for working with the States and getting them to submit draft applications so that problems can be identified and resolved in the early stages. The draft applications should be submitted as early as possible to Headquarters for comments, and Headquarters comments discussed with the States. (Guidelines on resolving recurring problems in State applications are included as Attachment 1.)

Final applications

Upon receipt of a final application the Regions will:

1. determine whether the application is complete, and if it is:

2. send copies of the final application to Headquarters for review, accompanied by a staff memorandum explaining how issues raised on the draft application have been resolved; (This should be done as early as possible so that Headquarters comments can be received before the public hearing.)

3. take care of the public participation process including: selecting a date for the public hearing, making the necessary arrangments for holding the hearing and publishing notice in the Federal Register;

4. work with the State to resolve all remaining issues identified either during the public participation process or by Headquarters;

5. when all issues have been resolved, prepare and transmit to Headquarters an Action Memorandum signed by the Regional Administrator recommending approval, explaining the major issues and their resolution, a Federal Register notice of the Administrator's decision, and a staff memorandum explaining how all issues have been resolved.

HEADQUARTERS ROLE

The policy specifies that program Assistant Administrators, the General Counsel, and the Assistant Administrator for Enforcement and Compliance Monitoring have the authority to raise issues which must be resolved prior to the approval of the State program. The policy also states that the process should include time limits for completion of reviews by all offices, that new issues should not be raised or old issues reopened unless there are material changes in the application, and that there should be some distinction between major objections which must be resolved before program approval and comments of a more advisory nature. We believe that for the sake of expeditious and consistent reviews, ODW should retain the role of coordinating Headquarters comments.

Draft applications, Final applications.

These and any other material for review by Headquarters should be sent to the Director, State Programs Division (SPD). The SPD will coordinate the review process with Office of General Counsel, Office of Enforcement and Compliance Monitoring and internally within the Office of Water. The Regions will be advised of the issues raised by the Review Team by a conference call between the Review Team and Regional staff. Written comments distinguishing major issues and advisory comments (if necessary) will be sent within 15 working days unless there is voluminous material to be xeroxed, in which case the review period will be extended to 20 working days. (The Region will be notified if such extension is necessary.) Written comments will be signed by the Director, State Programs Division.

Action memorandum and Federal Register Notice of Approval

These should be sent to SPD which will be responsible for obtaining the proper concurrences from all AAs involved and sending the package to AX for signature. The staff memorandum explaining resolution of all issues will be reviewed at the Review Team level within 5 working days. Assuming that all issues have been taken care of the process for obtaining all necessary signatures will take between 30 and 45 days.

II. PROGRAM REVISIONS

INTRODUCTION

Following EPA approval of a State UIC program, the State will from time to time make program changes which will constitute revisions to the approved program. The UIC regulations address procedures for revision of State programs at 40 CFR §145.32. These regulations direct the State to "keep the Environmental Protection Agency (EPA) fully informed of any proposed modification to its basic statutory or regulatory authority, its forms, procedures, or priorities." The regulations differentiate between "substantial" revisions which are rulemaking and must be approved by the Administrator and "non-substantial" revisions which can be approved by a letter to the Governor.

To date EPA has encountered the following types of revisions to approved State programs:

- Aquifer exemptions;
- Minor changes to the delegation memorandum of agreement;
- Regulatory and statutory changes which resulted in a more stringent program;
- Revisions to State forms which were part of the approved program;
- Transfer of authority from one State agency to another;
- Alternative mechanical integrity tests.

While providing a basic framework for program revisions, the regulations are not specific in defining "substantial" and "non-substantial" program revisions. These categories are defined below.

Definition of Program Revisions

Revisions to State UIC programs require EPA approval or disapproval actions only if they are within the scope of the Federal UIC program. Aspects of the program which are beyond the scope of the Federal UIC regulations are not considered program revisions under §145.32. For example, if a State

modifies permitting requirements for Class V wells, this would not be considered a program revision as long as the modified requirement was at least as stringent as the Federal UIC regulations, since the regulations do not require specific permitting of Class V wells.

"Substantial" versus "Non-substantial" Revisions

The wide range of possible program revisions and varying situations from State to State makes it impossible to establish a firm definition of what constitutes a "substantial" program revision. However, as a general rule, the following types of program revisions will be considered "substantial":

1. Modifications to the State's basic statutory or regulatory authority which may affect the State's authority or ability to administer the program;

2. A transfer of all or part of any program from the approved State agency to any other State agency;

3. Proposed changes which would make the program less stringent than the Federal requirements under the UIC regulations (or the Safe Drinking Water Act, for Section 1425 programs); and

4. Proposed exemptions of an aquifer containing water of less than 3,000 mg/l TDS which is: (a) related to any Class I well; or (b) not related to action on a permit, except in the case of enhanced recovery operations authorized by rule.

Any program revision which requires action by EPA, but which is not considered "substantial", will be a "non-substantial" revision.

REGIONAL ROLE

Substantial Program Revisions

Upon determining that a program revision is substantial, the Regions will:

1. send copies of the proposed revision to SPD;

2. take care of the public participation process;

3. work with the State to resolve problems, if any;

4. prepare an Action Memorandum and a Federal Register notice of Administrator's approval.

Non-substantial Revisions

The authority for approval of non-substantial revisions is delegated to the Regional Administrator. The Regions will forward a copy of the approval letter and of the approved revision to the State Programs Division.

Disapproval of Program Revisions

Disapproval of a proposed State program revision may be accomplished by a letter from the Regional Administrator to the State Governor or his designee.

For all aquifer exemptions, the Region should fill out and send to the SPD an Aquifer Exemption Summary Sheet (Attachment 2). If the exemption constitutes a substantial program revision or requires ODW concurrence, as much of the supporting material as feasible should be sent along. (Large maps and logs are difficult to reproduce and may be omitted.) Aquifer exemptions that constitute substantial revisions will be handled as described above. Where ODW concurrence is necessary it will be in the nature of a telephone call from the Director, SPD, because of the potential for short approval timeframes. Approval will be confirmed later by a memorandum. Guidelines for review of aquifer exemptions are included as Attachment 3.

Alternative Mechanical Integrity Tests

The authority to approve alternative mechanical integrity tests has been delegated to the Director, Office of Drinking Water. Therefore, such proposals and appropriate supporting documents should be submitted to the State Programs Division. The SPD will transmit them to the UIC technical Committee for review. If the Committee supports approval of the test, the Director of ODW will inform the Regions and approve the test as a "non-substantial" program revision.

III. RESOLUTION OF DIFFERENCES

The major effect of the Agency policy should be to speed up the resolution of issues. The policy states that senior managers are responsible for assuring that early consultation takes place so that issues can be identified and resolved internally as early as possible. Regional

Administrators are responsible for elevating to top managers those issues upon which there is internal disagreement. Differences can arise within Headquarters and between Headquarters and Regions. They will be handled as follows for both program approvals and substantial program modifications.

Within the HQ review team

If the Heaquarters Review Team cannot agree on whether an issue should be raised, the Review Team memorandum will reflect the majority comments. The dissenting office may send a memorandum signed by its Office Director or equivalent to the Water Division Director explaining its issue. If the Region agrees, it will raise the issue with the State. If not, the issue will be resolved using the process outlined below.

Between Headquarters and Region

1. The first step should be a Regional appeal to the "Bridge Team" (Office Directors). This can be accomplished within 10 working days. The Region should notify SPD by telephone that there is disagreement on a given issue. A Bridge Team meeting will be scheduled within 7 to 10 working days. The Region can attend the meeting, send a memorandum explaining its position, or rely on the SPD to present the Region's position. The decision of the Bridge Team will be communicated to the Region by telephone as soon as it is made, and confirmed, for the record, in a memorandum signed by the ODW Office Director with concurrence from other offices involved.

2. If this fails the Agency's "Decision-Brokering" Process should be invoked. This process is explained in detail in a February 1, 1984, memorandum from Sam Schulof. (Attachment 4)

IV. IMPLEMENTATION

This Guidance takes effect on July 1, 1984. We realize that many applications are now in the review process. For the sake of simplicity and clarity this process will only apply to those pending applications for which a public hearing has not been held or announced by that date.

Attachments

Guidelines for Resolving Recurring Problems in UIC Applications
Aquifer Exemption Summary Sheet
Guidelines for Reviewing Aquifer Exemption Requests
Sam Schulhof Memorandum of February 1, 1984

Attachment 1

GUIDELINES FOR RESOLVING RECURRING PROBLEMS IN UIC APPLICATIONS

Inadequate statutory authority

1. Authority to regulate all underground injection.

The regulations require that a State must have the authority to "prohibit any underground injection except as authorized by permit or by rule" 40 CFR §144.11. Many States have not enacted specific statutes parallel to the Safe Drinking Water Act (SDWA), but rely on the authority provided by statutes enacted to comply with RCRA or CWA. In such statutes the State's authority is often keyed to disposal of wastes or the regulation of pollution. If the definitions of these terms are not broad enough the State may not have the authority to regulate all classes of wells. The problem can usually be solved by the Attorney General if in his statement of legal authority he can make a colorable argument that the statutes do, in fact, give the State broad authority to regulate "non-waste" injection.

2. Authority to impose minimum requirements as stringent as the federally prescribed minimum requirements.

Even if a State can demonstrate authority over all injections, the enabling statute may not provide the authority to impose certain specific requirements. For example, a statute which simply mandates non-endangerment or protection of the "beneficial uses" of ground water may not provide the authority to impose construction requirements designed to achieve non-migration of fluids as prescribed by 40 CFR §§146.12, .22, and .32. As above, this issue can be solved by the Attorney General if he can assert that the specific technical requirements to be imposed by the State are within the authority established by the State's statute.

3. Authority on Federal lands and over Federal facilities.

State authority to regulate injection on Federal lands and by Federal agencies and facilities is explicitly required by the Act. Section 1421(b)(1)(D). Therefore, the State must demonstrate such authority.

Demonstration of authority over Federal agencies can usually be done by assuring that the State's definition of "person" or "owner or operator" includes officers or agencies of the Federal Government. At the very least, these should not be excluded from the definition, and the Attorney General should assert that the definition is broad enough to cover such entities.

As far as demonstration of authority over Federal lands is concerned, the Attorney General statement should include an explicit finding that the State has the authority to apply its UIC program on Federal lands. Furthermore, because the U.S. Geological Survey regulates some classes of wells on Federal lands, the Program Description should include a section describing the relationship between the State's and the Survey's regulatory activities.

4. Authority over Indian lands.

The UIC regulations assume that implementation on Indian lands is a Federal responsibility unless: 1) the State chooses to assert jurisdiction; and 2) the State demonstrates the necessary legal authority.

Several States which have asserted jurisdiction over Indian lands have relied on the fact that they have regulated non-Indian operators on these lands for years. This does not constitute an acceptable demonstration. There needs to be a discussion in the AG statement explaining the basis for the State's authority. A simple assertion from the Attorney General does not suffice since he is not simply interpreting State law but discussing relationships between State and Federal jurisdictions. The application must include the treaties or Federal statutes which grant the State such authority and the text of any opinions in any court case in which the State's authority in this regard was tested.

Inadequate demonstration under 40 CFR §145.21.

Pursuant to 40 CFR §145.21(d), a State need not develop a full regulation for a given class of wells if the State can demonstrate that no wells of the class exist, and that none can legally occur.

The demonstration that no well of a given class exist should be based on a reliable inventory or on geological or hydrological facts, and not be an unsubstantiated assertion.

The determination of whether a class of wells cannot legally occur is a matter of State law, and EPA will rely to a large extent on the interpretation of State law and regulations in determining whether the State has met the standard. Such a demonstration need not be made by any single set of circumstances. In all cases the State must have statutory authority over the class of wells. Where the State has an explicit statutory or regulatory prohibition of the class of well this obviously is an adequate demonstration. Where the State has no regulations the State might make the demonstration by showing that no injection may be authorized without a permit and that under law the State cannot issue permits (even if requested) in the absence of regulations.

Where the State does have applicable regulations the State might make the demonstration that no injection may occur without a permit by agreeing with EPA not to issue any permits and by showing that the State has the absolute discretion to make such an agreement. Other types of demonstrations may also be possible if they accurately reflect State law as stated by the Attorney General.

Inadequate definition of the resource to be protected.

1. Definition of underground sources of drinking water.

The Federal regulations define underground sources of drinking water (USDWs) explicitly at 40 CFR §144.3. A number of statutes that we have reviewed authorize the State agency to protect "waters of the State" or "fresh water". These terms leave a great deal of discretion to the State agency to define the resource to be protected. The discretion should be tied down in the regulations which should use EPA's definition. If this cannot be done then, at the very least, the State should agree in the MOA to interpret its definition as being as broad or broader than EPA's and the Attorney General statement should certify that it is within the State's authority to do so.

2. Aquifer exemptions.

In some States, Class II and III operations may be taking place in aquifers containing less than 10,000 mg/l TDS. These aquifers must be exempted in accordance with 40 CFR §146.04 in order for these operations to remain legal. All information necessary for EPA to approve the exemptions should be included in the application. This includes a demonstration that the aquifer is not currently used and that it meets one of the criteria of §146.04(b). The aquifer must also be identified in terms of areal extent and depth.

3. EPA role in subsequent exemptions.

There must be a clear agreement on the part of the State that exemptions subsequent to approval of the State program will be treated in accordance with 40 CFR §144.7(b)(3). If this is not clear in the State's regulations, the State should address the question in the MOA. EPA will consider some flexibility in the process for approval of these exemptions and the timing of EPA's actions.

Inadequate permitting process.

So far the major problems that we have encountered with regard to permits have been the level of public participation in the

permitting process and the possibility of permits issuing by default.

1. Public participation.

Some State statutes limit the definition of interested parties to such entities as "adjacent landowners" or "mineral rights owners". EPA's regulations require that the general public be informed of permit applications and given the right to comment. This problem can usually be solved by the State agreeing in the MOA to taking whatever additional measures are necessary to assure adequate participation by the public.

2. Default permits.

Several States have statutes which require permit applications to be acted upon within a stated period of time. These requirements must be scrutinized with care. If the effect of the requirement is that a permit automatically issues at the default deadline, the State would not be able to demonstrate that no injection that could endanger underground sources of drinking water will be authorized. In this case, there is little recourse but to get the State to amend its statutes. If, however, the deadline simply compels the State to act, but the State can still require all necessary permit conditions, and assure adequate public participation before the permit is issued, the deadline may be acceptable.

The Attorney General statement should explicitly address the effect of such statutory sections and certify that the State can in all cases impose appropriate permit conditions or deny the permit if such action is warranted.

Inadequate authorization by rule.

If any injection wells are in operation in a State at the time the State's UIC program is approved, these wells become illegal unless permitted or authorized by rule. Since all wells cannot be permitted immediately upon the effective date of the State program the State regulations must contain the language of a rule clearly authorizing the wells to continue operation for a given period of time and spelling out the requirements with which an operator must comply. In some cases however, an existing State permit program already submits owners and operators to the requirements of EPA's authorization by rule. If these permits continue in effect until UIC permits are issued, the State need not authorize wells by rule.

Where applicable the Attorney General statement must certify that the State has the authority to authorize injection by rule and to impose the specific requirements. We have reviewed several programs where the statutes seemed to give the State

only the authority to require permits. The Attorney General should then explain how the State can authorize by rule. A possibility is to state that rules are a form of permits.

Inadequate enforcement authority.

The State statutes should provide for the enforcement mechanisms and civil and criminal penalties in at least the amounts specified in 40 CFR §145.12. EPA may make an exception to these requirements for: 1) Class I, II or III wells where banned, 2) Class II wells covered under §1425; and 3) Class V wells. Furthermore, the State's authority should not be limited by the use of qualifiers such as "willfully" or "knowingly" in the language of the statutory provisions. If a State statute is lacking in regard to any of these provisions it is very difficult to resolve the problem without legislative changes. It is sometimes possible to find other environmental statutes that could provide the necessary penalty authority. The Attorney General must certify that these authorities can be applied to violations of the UIC program.

Finally, the State must have the ability to enforce both against violations of the terms of a permit and violations of the statutes and regulations in general. If the statutes do not explicitly provide that ability and the Attorney General cannot provide a satisfactory argument that the State somehow has this ability, legislative changes may be necessary.

Problems with incorporation by reference

EPA supports the concept of State incorporation by reference of the Federal regulations where the Attorney General can assert that it is consistent with State law. However, if the Federal regulations were ever amended it would be difficult for operators in the State to locate a definite body of regulations that constituted the regulations legally effective in the State. The State may consider actually printing out the language of the Federal regulations in the State administrative code.